

Reply to the Attention of A. Neil Campbell
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VIA FAX to + 49 228 949 9140 and EMAIL to andreas.mundt@bundeskartellamt.bund.de

Andreas Mundt
President
Bundeskartellamt
Kaiser-Friedrich-Strasse 16
53113 Bonn
Germany

Dear President Mundt:

Re: New Merger Notification Threshold In Germany

We write on behalf of the Merger Streamlining Group (“MSG” or the “Group”), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.¹ The cornerstone of the Group’s activity has been to work with competition agencies and governments to help implement international best practices in merger control. In particular, the Group focuses on the *Recommended Practices for Merger Notification Procedures* of the International Competition Network (“ICN”).²

The MSG was founded in 2001. Its work to date has included two major surveys on implementation of the *Recommended Practices*, as well as more than 50 submissions to the European Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in more than twenty other jurisdictions (e.g., the United Kingdom, Russia, Brazil, India, China, Japan, Korea, Spain, Italy, Philippines and Portugal) to promote reforms consistent with the *Recommended Practices*, including several prior submissions to the Bundeskartellamt (“BKartA”).

We write in connection with the entry into force in June 2017 of a new merger notification threshold in Germany (the “New Threshold”), which was adopted as part of the 9th

¹ The current members of the Group include Accenture, BHP Billiton, Bosch, Chevron, Cisco, Danaher, General Electric, Novartis, Oracle, Procter & Gamble, Siemens, and United Technologies.

² International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <<http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>> (“Recommended Practices”).

Amendment of the *Act Against Restraints of Competition*.³

The Group recognizes the important role that the BKartA plays in ensuring a competitive marketplace by enforcing the German competition laws. However, unless guidelines are established to clearly identify the limited types of transactions that the BKartA is most concerned about, the adoption of the New Threshold will represent a significant expansion of the prior German merger control regime, whose pre-existing notification thresholds already generated more than 1,200 notifiable transactions per year.⁴ This figure stands in marked contrast to, for example, the Directorate General for Competition of the European Union, which received only 337 merger notifications in the same period, or the French Competition Authority, which received 249 notifications.⁵

The explanatory materials accompanying the draft of the 9th Amendment of the *Act Against Restraints of Competition* (the “Explanatory Materials”) indicated that a perceived enforcement gap in Germany relating to non-notifiable transactions such as *Facebook / WhatsApp* motivated the adoption of the New Threshold. While recognizing that it would be difficult to predict how many additional transactions would be subject to notification under the New Threshold, the Explanatory Materials suggested this number would be minor, and perhaps as few as three additional notifications per year. However, without further policy guidelines from the BKartA, it would appear from the design of the New Threshold that it will require notifications for a significant number of international transactions.

Given the potentially significant expansion of German merger control law to a broad range of international transactions, which may raise questions about the level of local nexus⁶ that such newly-notifiable transactions have to Germany, the Group respectfully suggests that the BKartA track, and publish, statistics relating to the number of transactions notified to the BKartA annually as a result of the New Threshold. Perhaps this information could be included in the biannual “Tätigkeitsbericht” report published by the BKartA, beginning with the report for 2016/2017.

Such information could play an important role in allowing the benefits and burdens of this novel form of notification threshold (which is already being emulated elsewhere) to be assessed in an objective manner. It would also facilitate the BKartA’s, and your own,

³ We understand that the New Threshold requires that transactions with a total deal value exceeding €400 million and a target company that is “*substantially active*” in Germany be pre-notified to the BKartA.

⁴ The latest Tätigkeitsbericht report for 2015/2016 indicates that 1,229 transactions were notified to the BKartA for review in 2016 (and 1,211 in 2015). *See also*, Global Competition Review, *Rating Enforcement 2016*, “Germany’s Federal Cartel Office”, which indicates that 1,219 transactions were notified to the BKartA for review in 2015.

⁵ *Ibid.*, at “European Union Directorate General for Competition” and “France’s Competition Authority”.

⁶ As you know, the *Recommended Practices* stipulate that “[j]urisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned” and deal at length with the issue of notification thresholds requiring a material level of local nexus; *see, e.g.*, *Recommended Practices I.A, I.B, I.C*, and the related Working Group Comments.

objective of making “*the work of the Bundeskartellamt as transparent as possible in order to encourage discussion on competition issues.*”⁷

* * *

Thank you very much for considering the Group’s views. We believe that tracking and publishing data regarding the annual number of transactions notified under the New Threshold will generate benefits for both the BKartA and the international business community. We would welcome the opportunity to respond to any questions or discuss this suggestion with you or your colleagues further, at your convenience.

Yours very truly,



A. Neil Campbell



Casey W. Halladay

Copy to: Members of the Merger Streamlining Group

⁷ See *The Bundeskartellamt in Bonn: Organisation, Tasks and Activities*, “Foreword” (by Andreas Mundt), available online at http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Brosch%C3%BCren/Brochure%20-%20About%20the%20Bundeskartellamt.pdf?__blob=publicationFile&v=19.